

THIRD DIVISION
FEBRUARY 11, 2014

No. 1-11-3091

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 19567
)	
KEVIN WILLIAMS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

O R D E R

¶ 1 **Held:** Impeachment of defense witness on collateral matter did not amount to plain error to excuse forfeiture and counsel was not ineffective for failing to preserve the issue where there was no prejudice to defendant; there was no improper elicitation of hearsay evidence; \$200 DNA fee vacated; judgment affirmed in all other respects.

¶ 2 Following a bench trial, defendant Kevin Williams was found guilty of being an armed habitual criminal and sentenced to seven years' imprisonment. On appeal, he contends that the trial court erred in allowing the State to impeach a defense witness on a collateral matter, and elicit hearsay evidence. He also contests the propriety of the DNA fee imposed against him.

¶ 3 The record shows that defendant was charged, in relevant part, with armed habitual criminal based on his possession of a gun after having been convicted of delivering a controlled substance and burglary. His co-defendant, Alexander Sterling, was also charged with, *inter alia*, unlawful use, or possession, of a weapon by a felon.

¶ 4 Prior to trial, defendant and Sterling filed separate motions to suppress which were heard jointly. Chicago police officers Paul Zogg, and Santo Reyes testified at that hearing, as well as Sergeant Demond Parker of the Cook County Sheriff's Department and Illinois Homeland Security for Marquette Park. The trial court denied the motions, and defendant and Sterling elected bench trials. These trials were held separately, and Sterling was acquitted of all charges.

¶ 5 At defendant's trial, the parties stipulated to the suppression hearing testimony given by the officers in that proceeding. Sergeant Parker testified that in the evening hours of October 4, 2010, he was off-duty, and working for a private security company in the Marquette Park neighborhood of Chicago, with his partner, Officer Amador. In that employ, he saw defendant, wearing a red and black checkered "hoody," and several other men and women standing near the corner of 71st Street and Artesian Avenue yelling gang slogans and making gang signs with their hands. The officers pulled up to the group, Officer Amador told defendant to stop, and he backed away grabbing his side. Officer Amador then yelled, "gun," and defendant fled. Sergeant Parker pursued defendant and saw the handle of the gun hanging out of his pocket. When defendant hopped over a fence, Parker observed defendant remove the gun, then lost sight of defendant, but found his discarded "hoody." Sergeant Parker sent a radio message to Chicago police with defendant's description, and thereafter saw defendant running again. He and Chicago police officers pursued him on foot into a building, and took him into custody.

¶ 6 Chicago police officer Paul Zogg testified that at 8:30 p.m. on October 4, 2010, he was canvassing the area of 7115 South Campbell Avenue in Chicago based on a radio message of a man with a gun. As he was canvassing, he noticed defendant about 50 yards away from him holding a handgun. Defendant then fled into the building at 7115 South Campbell Avenue, and Officer Zogg pursued him. Defendant dropped the gun in the front stairwell as he fled to the second floor apartment where police detained him after entering without force. The officers searched the apartment where defendant was detained, and found another weapon under a mattress.

¶ 7 Sterling Alexander approached them outside the building, disregarded police orders, asked them why they were in his home, and became aggressive. When he tried to force his way past police, he was arrested, and the officers attributed the second weapon found in the apartment to him.

¶ 8 At this point, the court granted the State leave to admit defendant's certified copies of conviction for burglary, and delivery of a controlled substance for the purpose of establishing defendant's guilt as a habitual offender. Defendant then moved for a directed finding which was denied.

¶ 9 The defense called Krystal Wilson who testified that defendant is her cousin. At 8 p.m. on October 4, 2010, she was with defendant and her friend Deandre just outside 7115 South Campbell Avenue. While they were walking to a liquor store at 71st Street and Artesian Avenue, Marquette security approached them and told them to move. Defendant exchanged words with security personnel who then pursued him. Wilson continued on her way and entered the liquor store.

¶ 10 Three minutes after she had seen defendant run away, Wilson saw him on the porch of 7115 South Campbell Avenue, and sat down there with him. While they were talking, police and security personnel drove up and took defendant, who was still on the front porch, into custody. Wilson testified that she did not see defendant with a gun that evening, nor drop anything, or enter the 7115 South Campbell Avenue residence. Wilson further testified that defendant did not have a gun going to the liquor store, but that she did not know if he had a gun while he was running back to Sterling's home.

¶ 11 Sterling Alexander testified that he and defendant have been friends for six years, and acknowledged his prior burglary conviction. On October 4, 2010, he arrived home around 8 p.m., and saw a Marquette security car in front of his home. Security personnel had defendant handcuffed in their car, and were trying to gain access to his home, but were unsuccessful. Security personnel then placed him on the car, and when Chicago police arrived, he noted that Wilson was across the street. Chicago police officers then placed him in their car, and kicked in his door.

¶ 12 Sterling further testified that after police found a firearm in his apartment, they asked him some questions. Sterling denied telling Officer Zogg that he had two handguns under his mattress, that he wanted to be a security guard, and that he bought the gun recovered from defendant three years ago. When asked if he told Officer Zogg that he thought it was okay to have the gun because he had a FOID card, defense counsel objected based on relevance. The State responded that it wanted to impeach Sterling regarding whether or not defendant was inside the apartment. The State further stated that it was "going through the whole statement but it's the last line of his statement to this particular officer." The court allowed further questioning

on this matter, and when Sterling was asked if he told Officer Zogg that he never gave defendant permission to enter his apartment where they found him, he responded, "[n]o, I didn't. He was never in my apartment, no." Sterling further testified that he was not with defendant prior to seeing him in the police car, but had seen him earlier wearing a red and black "hoodie."

¶ 13 Sterling further testified that his door is self-locking in that it locks when the door is closed. He also testified that defendant and Wilson do not have keys to his home.

¶ 14 In rebuttal, the State presented Officer Zogg who testified that he spoke to Sterling at the police station. Sterling told him that he bought the gun defendant was arrested with three years ago. Defense counsel objected, and the court overruled him. Sterling also told Officer Zogg that he never gave defendant permission to be inside his apartment. When the State began to ask further questions on this matter, defense counsel objected based on hearsay and relevance to whether defendant had a gun. The court allowed further testimony only for "the limited purpose of impeaching [] Alexander for this period of time." Officer Zogg then testified that when Sterling told him he had never given defendant permission to be inside his apartment, he was responding to a question he was asked about defendant being inside his apartment that day.

¶ 15 Officer Zogg further testified that when he pursued defendant into the building, defendant was holding a handgun in his right hand, and there was no one sitting on the porch. Officer Zogg testified that he did not need to kick in the door to Sterling's apartment because it had not closed after defendant. Later, however, he realized he left something in the apartment, and the police kicked in the door.

¶ 16 At the close of evidence, the court found that the officers' testimony "clearly establish[ed]" that they saw defendant with a gun in his hand initially in the area of 71st Street

and Artesian Avenue. He was chased, and during the course of the pursuit, he ran into the building at 7115 South Campbell Avenue. The court noted that the testimony from Wilson and Sterling "illuminates fully the incident that went on, but neither one testified directly as to the time of the recovery" of the weapon, and that neither one was present at the time. The court then found defendant guilty of being an armed habitual criminal beyond a reasonable doubt.

¶ 17 Defendant filed a motion for a new trial alleging, in relevant part, that the court erred when it allowed the State to introduce impermissible hearsay evidence over his objection at trial regarding questions posed to Officer Zogg about his conversation with Sterling. The court, however, denied the motion.

¶ 18 On appeal, defendant maintains that the court erred in permitting the State to question and impeach Sterling regarding the collateral matter of what he said to Officer Zogg about his own alleged possession of the guns recovered by the police, and their conversation as to whether Sterling gave defendant permission to be inside his apartment, and his location at the time of the arrest. He maintains that this questioning was irrelevant to whether he (defendant) had a gun in his possession, and requests this court to reverse his conviction and remand the cause for a new trial.

¶ 19 As an initial matter, the State maintains that defendant waived those questions for review that he did not object to at trial and raise in his post-trial motion, as required under *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Our review shows that defendant objected at trial to the questioning of Officer Zogg about whether Sterling told him he never gave defendant permission to be inside his apartment, and raised it in his post-trial motion. Defendant, however, did not include his trial objection to the questioning regarding Sterling's possession and ownership of the

recovered guns in his motion for a new trial. Accordingly, defendant failed to preserve for review the propriety of the impeachment of Sterling regarding his possession of the guns.

Enoch, 122 Ill. 2d at 186. As a result, we may review that forfeited issue only if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 20 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). To obtain relief, however, defendant must first show that there was a clear or obvious error. *Hillier*, 237 Ill. 2d at 545.

¶ 21 Defendant claims that the court erred in allowing the State to question and impeach Sterling on collateral matters. The test to determine whether a matter is collateral is whether it could be introduced for any purpose other than to contradict. *People v. Wadley*, 169 Ill. App. 3d 1036, 1046 (1988). The application of the collateral-noncollateral distinction is best left largely to the discretion of the trial court. *People v. Collins*, 106 Ill. 2d 237, 269-70 (1985). This court will not interfere unless there has been a clear abuse of discretion that results in manifest prejudice to defendant. *Collins*, 106 Ill. 2d at 269.

¶ 22 Contrary to defendant's contention, the questioning and impeachment of Sterling regarding defendant's location at the time of his arrest and whether he told Officer Zogg that he never gave defendant permission to be inside his apartment was not improper collateral testimony as it was relevant to defendant's theory of the case, namely, that he was outside Sterling's home when he was arrested. Moreover, even if any of the questioning on this matter was improper, it did not result in manifest prejudice to defendant given the overwhelming

evidence of his guilt provided by the officers who testified to observing defendant with a gun and the non-exonerating nature of the defense witnesses' testimony, who were unaware of defendant's actions as he was being pursued by police and security personnel. *Prevo*, 302 Ill. App. 3d at 1050.

¶ 23 As for the questions regarding Sterling's ownership of the guns, Sterling did not testify about the recovered firearms during direct examination. Thus, the questions regarding Sterling's ownership of the recovered firearms fell outside of the general parameters of cross-examination in that they did not explain, disqualify, discredit or destroy his direct testimony. *People v. Stevens*, 2013 IL App (1st) 111075, ¶52. In addition, the questions posed to Officer Zogg regarding Sterling's statements as to whether he possessed the recovered guns was irrelevant to whether defendant possessed a gun, and thus collateral.

¶ 24 Notwithstanding, we find that the error in allowing the testimony did not amount to plain error given the overwhelming evidence of defendant's guilt based on the testimony of Sergeant Parker and Officer Zogg who both testified to their observations of defendant with a gun. *People v. Prevo*, 302 Ill. App. 3d 1038, 1050 (1999). Sergeant Parker testified that he saw defendant jump a fence and pull the gun out of his pocket as he did so. Officer Zogg testified that as he was canvassing the area he saw defendant running with a gun in his hand, then pursued defendant inside the building where he observed defendant drop the gun on the front stairwell.

¶ 25 Sterling testified that he arrived at the scene when defendant was already handcuffed and inside an officer's car, and was unaware of what took place prior to his arrival. He also testified that defendant did not have keys to his apartment, although that fact also had no bearing on the issue of whether defendant possessed a gun. Sterling did not provide any information as to

whether defendant was in possession of a gun when he fled from the security personnel after one of them yelled, "gun," and as a result, his testimony did not establish defendant's innocence and defendant's case did not stand or fall based on Sterling's testimony. *People v. Rosario*, 180 Ill. App. 3d 977, 983 (1989). Thus, any improper impeachment of Sterling did not result in manifest prejudice to defendant. *Collins*, 106 Ill. 2d at 269.

¶ 26 Under these circumstances, the error in allowing the collateral questioning did not amount to plain error given the overwhelming evidence of defendant's possession of the gun. As a result, defendant cannot satisfy the first prong of the plain error test, namely, closely balanced evidence (*Herron*, 215 Ill. 2d at 178-79), and since he has not argued the second prong of plain error, we need not address it (*Hillier*, 237 Ill. 2d at 545-46).

¶ 27 Defendant, nonetheless, maintains that the State elicited an "inappropriate hearsay inference" when it questioned Sterling about the conversation he had with Officer Zogg. Defendant contends that the State's questioning of Sterling as to whether he gave defendant permission to go inside his apartment where they found him elicited a hearsay response from him that defendant was inside his apartment when he was arrested, thereby bolstering Officer Zogg's testimony with a prior consistent statement.

¶ 28 We observe that Sterling's testimony was based on his statements to Officer Zogg, and not what Officer Zogg had told him. Sterling testified, in relevant part, that defendant was never in his apartment, and that he did not tell Officer Zogg that he never gave defendant permission to enter his apartment. These statements do not indicate or even infer that Sterling knew that defendant was inside his apartment, and, accordingly, defendant's hearsay claim, namely, that Sterling presumed that defendant was in his apartment at the time of the arrest based on what

Officer Zogg told him, is without merit. Moreover, any impermissible hearsay evidence admitted on this matter was harmless error given the overwhelming evidence of defendant's guilt of the charged offense, and the non-exonerating nature of the defense witnesses' testimony.

People v. Warlick, 302 Ill. App. 3d 595, 601 (1998).

¶ 29 Defendant further claims, however, that trial counsel was ineffective for failing to preserve for review the issue of whether the State's questioning and impeachment of Sterling about his own alleged possession of the guns recovered by the police was inappropriate as a collateral matter. Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 30 As found above, the evidence against defendant was overwhelming. The defense witnesses had no knowledge of the pursuit in which the officers made their observations of defendant with the gun, and, accordingly, the defense witnesses did not provide exonerating evidence for defendant. Under these circumstances, we find no prejudice arising to defendant for counsel's failure to preserve the issue for review, and defendant's ineffective assistance claim fails. *Harris*, 206 Ill. 2d at 304.

¶ 31 Defendant next contends that the \$200 DNA fee must be vacated because he previously submitted a DNA sample. Based on the supreme court decision in *People v. Marshall*, 242 Ill.

2d 285, 297, 303 (2011), the State agrees that a DNA analysis fee is authorized only where defendant is not currently registered in the DNA database. Pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we therefore vacate the \$200 DNA assessment, and direct that the trial court's order be modified to that effect.

¶ 32 In light of the foregoing, we vacate the \$200 DNA fee, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 33 Affirmed as modified.